APPEAL NO. 93397

On April 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing was held pursuant to Texas Workers' Compensation Commission Appeal No. 93092, decided March 18, 1993, which remanded the case to the hearing officer for further consideration and development of evidence. The issues on remand were: 1) whether the claimant's present lower back problems are related to his original injury of (date of injury); 2) whether the claimant has reached maximum medical improvement (MMI); and 3) if the claimant has reached MMI, what is the claimant's impairment rating. The hearing officer determined that the claimant sustained a compensable injury to his face and neck on (date of injury), but did not sustain a compensable injury to his lower back on (date of injury); that the claimant reached MMI on September 11, 1992; and that the claimant has a zero percent impairment rating. The claimant, who is the appellant, disagrees with the hearing officer's decision that he is not entitled to any income benefits after September 11, 1992, but that he remains entitled to medical benefits. The carrier, who is the respondent, responds that the hearing officer's decision is supported by the evidence and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

While working for his employer, (employer), on (date of injury), the claimant was hit in the face by about a cupful of sand or dirt that was thrown out of the end of a plastic pipe which was being removed from the ground by a backhoe. When the accident occurred, the claimant was standing about 12 to 15 feet away from the backhoe and pipe. The claimant did not fall down when he was hit, and the force of the impact was not strong enough to knock off his hard hat or glasses. It did cause a minor nose bleed. On the day of the accident, the claimant was examined by Dr T., who diagnosed head trauma with mild concussion and cervical sprain. The claimant was examined by several other doctors, including, among others, Dr. ., who is his treating doctor, and Dr. O., who is the doctor selected by the Commission to be the designated doctor. Diagnoses of the treating doctor and the designated doctor included, among other things, a disc herniation at L5-S1 and spondylolysis at L4-5 and L5-S1 which were revealed by an MRI. The designated doctor, in finding that the claimant had not reached MMI, stated that the claimant sustained a back injury "related to the type of work he did on the day of the injury on 6-29-92." The claimant contended that his lower back problems were caused by the accident of (date of injury) and testified that he had back pain as well as neck pain from the day of the injury.

As concerns the first issue at the hearing, the hearing officer found that the claimant sustained an injury only to his face and cervical spine while working for the employer on (date of injury), and concluded that the claimant did not sustain a compensable injury to his lower back on that day. The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. The claimant

had the burden of showing a causal connection between his lower back problems and his employment. Spillers v. City of Houston, 777 S.W.2d 181 (Tex. App.-Houston [1st Dist.] 1989, writ denied). Articles 8308-6.34(e) and (g). The incident in question was described by the claimant and two witnesses at the hearing and two other witnesses gave written statements. The descriptions of the incident are fairly consistent, and taken together or alone, could reasonably lead to inferences that the small amount of dirt or sand which hit the claimant's face did so without a significant amount of force, that the claimant's physical reaction to being hit was not of a violent or abrupt nature, and that the incident would not have caused a herniated disc in the claimant's lower back or an aggravation of preexisting disc disease. With regard to the designated doctor's opinion that the claimant sustained a back injury at work on June 29th, we have previously held that "any question of injury is resolved by the hearing officer as finder of fact; the designated doctor's opinion is only entitled to a presumption, within the purview of Articles 8308-4.25 and 4.26, in regard to MMI and impairment rating, not as to injury." Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993. *See also* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. We also observe that the history of the injury as recited in the designated doctor's report is not entirely accurate as the designated doctor reported that the claimant was hit in the face by the pipe on (date of injury), which, according to the claimant and other witnesses did not happen. Having reviewed the evidence, we conclude that the hearing officer's finding that the claimant sustained an injury only to his face and cervical spine, and his conclusion that the claimant did not sustain a compensable injury to his lower back on (date of injury), are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

The hearing officer also found that "the sole cause of any problems related to [the claimant's] lower back are the result of something other than the injury sustained by claimant on (date of injury), while working for [the employer]." While this finding is not specifically challenged on appeal, we observe that the first issue at the hearing was whether the claimant's present lower back problems are related to his original injury of (date of injury). The claimant had the burden of proof on that issue inasmuch as he had to show that his injury was received in the course and scope of his employment. Johnson, *supra*; Spillers, *supra*. The hearing officer found that the claimant sustained an injury only to his face and cervical spine on (date of injury). By limiting the injury to "only" the face and the neck, the hearing officer impliedly found against the claimant on the issue presented for determination and we have found that that determination is not against the great weight and preponderance of the evidence. Although evidence of prior accidents and surgery was presented at the hearing, there was no specific issue framed by the hearing officer at the hearing concerning the "sole cause" of the claimant's lower back problems. Consequently, we consider the finding on sole cause to be an unwarranted finding because a sole cause issue was not before the hearing officer for determination. It has been held that an

"unwarranted finding may be disregarded and judgment rendered for the plaintiff on the valid findings." Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940). *See also* Texas Workers' Compensation Commission Appeal No.92673, decided January 28, 1993; Texas Workers' Compensation Commission Appeal No. 92198. July 3, 1992; Texas Workers' Compensation Commission Appeal No. 92102, decided April 24, 1992; Texas Workers' Compensation Commission Appeal No. 91084, decided January 3, 1992.

Concerning the issues of MMI and impairment rating, the hearing officer determined that the claimant reached MMI on September 11, 1992, with a zero percent whole body impairment rating as reported by Dr. F in a Report of Medical Evaluation (TWCC-69). Dr. F examined the claimant on September 11, 1992, at the request of the carrier and was not a designated doctor. Dr. O, the designated doctor selected by the Commission, reported in a TWCC-69 dated October 28, 1992, that the claimant had not reached MMI. The hearing officer found that the designated doctor's report was invalid because his report was based on the incorrect assumption that the claimant sustained a lower back injury in addition to the injury to his face and neck. The hearing officer further determined that the great weight of the other medical evidence is contrary to the report of the designated doctor.

Pursuant to Articles 8308-4.25(b) and 8308-4.26(g), the report of the designated doctor selected by the Commission concerning MMI and impairment rating has presumptive weight and the Commission must base its determinations of MMI and impairment on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. We have previously observed that it is not just equally balancing evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including that of a treating doctor, is accorded the special presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. MMI means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). The first part of the definition of MMI applies to the facts of this case.

In a narrative report attached to his TWCC-69, Dr. O diagnosis, among other things, a lumbosacral strain with disc herniation at L5-S1 and states that "[t]his patient obviously sustained a back injury related to the type of work he did on the day of the injury on 6-29-92." Thus, it is apparent that in certifying that the claimant had not reached MMI, Dr. O took into consideration the claimant's lower back problems; that is, a disc herniation at L5-S1 and a lumbosacral strain. Since the claimant's lower back problems have been determined not to be part of the claimant's work-related injury of (date of injury), the hearing officer could find that Dr. O's report was invalid for the reason that Dr. O based his determination of no

MMI in part on an injury which was not part of the work-related injury. Article 8308-3.01 makes an insurance carrier liable for compensation for an employee's injury that arises out of and in the course and scope of employment. Although we think it obvious from a reading of the 1989 Act that the word "injury" as used in the statutory definition of MMI means the employee's work-related injury or compensable injury notwithstanding that such terms are not used in the definition of MMI to qualify the word "injury", the fact that MMI is to be based on the work-related injury is clearly demonstrated in Tex. W.C. Comm'n, 28 TEX. ADMIN CODE § 130.2(a), which states:

> (a)A treating doctor shall examine the employee and certify that an employee has reached maximum medical improvement and assign an impairment rating, if any, as soon as the doctor anticipates that the employee will have no further material recovery from or lasting improvement to the work-related injury or illness, based on reasonable medical probability. (Emphasis supplied).

As to the other medical evidence concerning MMI and impairment rating, Dr. D, the claimant's treating doctor, stated in a Specific and Subsequent Medical Report (TWCC-64) dated March 8, 1993, that the anticipated date the claimant will reach MMI is "undetermined." However, it is clear from his attached narrative report that he has based his opinion concerning MMI in part on his diagnosis that the claimant has low back pain secondary to a disc herniation at L5-S1. Consequently, Dr. D, like Dr. O, has formulated an opinion on MMI which takes into account an injury other than the work-related injury. In a report of range of motion test results dated July 29, 1992, Dr. D had indicated that the claimant had a 16% impairment in connection with range of motion of the lumbosacral spine and a 19% impairment in connection with range of motion of the cervical spine. He did not mention MMI in that report.

At the request of Dr. T, the first doctor to examine the claimant, the claimant was examined by Dr. S., a neurosurgeon, on July 1, 1992. Dr. Thad indicated in a TWCC-69 he completed the day after the claimant's accident that the claimant had not reached MMI and that MMI was to be determined by D s. Dr. S anticipated that the claimant would reach MMI on October 1, 1992. He reported that a neurological examination revealed no abnormalities, and stated that "essentially nothing about this case makes a great deal of sense to me starting with the mechanism of injury," and that "I believe that further follow-up here would be wasteful of everyone's time and money."

On August 12, 1992, Dr. M., gave the claimant a neurologic examination and stated that "I can find no neurologic dysfunction on this patient's examination, and his cervical CT scan appears normal. Parts of his examination indicate either hysterical component or malingering." Dr. M also stated that "at this point, from a neurological standpoint, I can find no justification for his [the claimant's] continued pain and sensory complaints."

In an undated TWCC-69, Dr. F, whom the claimant saw at the request of the carrier, certified that the claimant reached MMI on September 11, 1992, with a zero percent whole body impairment rating. In an attached narrative report, Dr. n said he evaluated the claimant on September 11th, that review of x-rays demonstrated no problems with the skull, cervical spine, thoracic spine, or lumbar spine, that no abnormalities were found on an MRI of the cervical spine and a CAT scan of the head, and that range of motion testing revealed only a slight lack of range of motion on cervical flexion. No abnormalities were noted in the lumbar range of motion.

In a letter to the carrier dated September 11, 1992, Dr M, who examined the claimant at the request of the carrier, reported that he had evaluated the claimant for a post-cervical sprain/strain. His findings were that the claimant has zero percent impairment due to range of motion loss (he noted that all ranges of motion of the cervical spine were within normal limits), zero percent impairment due to neurologic loss, and zero percent total spinal impairment.

In a letter dated March 19, 1993, Dr. P., who examined the claimant at the request of Dr. Driscoll, diagnosed the claimant as having C8-T1 neuropathy resulting in bilateral reflex sympathetic dystrophy. He did not give an opinion on MMI or impairment rating, but recommended "stellate danglion sympathetic blocks" which he described as "diagnostic and therapeutic." He also recommended additional testing.

Having reviewed the record, we conclude that the hearing officer's finding that the great weight of the medical evidence is contrary to the report of Dr. O, the designated doctor, is supported by the evidence. In the first instance, Dr. O bases his determination that the claimant has not reached MMI in part on a lower back injury which has been determined not to be part of the claimant's work-related injury. He also bases his opinion on an incorrect history of the injury in relating that the claimant was hit in the face by the pipe on (date of injury). Likewise, Dr. Dr, the treating doctor, bases his determination that the claimant has not reached MMI in part on the lower back injury. As previously observed, a determination regarding MMI is to be based on the work-related injury or illness. *See* Rule 130.2(a). On the other hand, Dr. F, after examining the claimant, performing range of motion testing, and reviewing test results, including results of an MRI of the cervical spine and a CAT scan of the head, certified that the claimant had reached MMI on September 11, 1992, with zero percent impairment. Dr. Fs findings concerning no impairment were corroborated by Dr. M's findings. In addition, Dr. S found no abnormalities after a neurological examination, and Dr. M also found no neurological dysfunction and reported that a CAT scan of the cervical spine was normal. Dr. P diagnosed reflex sympathetic dystrophy, but gave no opinion regarding MMI or impairment. Given the fact that the designated doctor incorrectly assumed that the claimant sustained a work-related lower back injury on (date of injury), in making his assessment regarding MMI, and the fact that MMI has been certified by Dr. F in

regard to head and neck injuries and that Dr. F's findings of no impairment are supported by Dr. Mitchell and by tests conducted by Drs. S and M, it is our opinion that the finding on the great weight of the medical evidence being contrary to the designated doctor's report is supported by the evidence.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge